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7 UNITED STATES DISTRICT COURT  
8 WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

9 BENJAMIN ANDREW LAIGO, III,

10 Plaintiff,

11 v.

12 KING COUNTY,

13 Defendant.

CASE NO. C16-1541-TSZ-MAT

REPORT AND RECOMMENDATION

14  
15 INTRODUCTION AND SUMMARY CONCLUSION

16 Plaintiff Benjamin Laigo is currently incarcerated at Coyote Ridge Corrections Center  
17 (CRCC) and proceeds pro se and *in forma pauperis* in this civil rights action pursuant to 42 U.S.C.  
18 § 1983. Plaintiff alleges deliberate indifference to his serious medical needs during his  
19 confinement as a pretrial detainee at King County Correctional Facility (KCCF). (Dkt. 4.)

20 Plaintiff initially identified numerous defendants in this case. Because he could not  
21 properly bring suit against either Harborview Medical Center (HMC) or KCCF, the Court  
22 dismissed those entities prior to service. (Dkt. 5 at 2-3.) The Court allowed for service on HMC  
23 physician Dr. Henry Sagi and on King County, noting with respect to the latter that plaintiff

1 appeared to allege a constitutional violation through one or more municipal policies or practices,  
2 such as acts or omissions occurring as a result of “pre-trial needs.” (*Id.* at 3.) The Court  
3 subsequently dismissed plaintiff’s claims against Dr. Sagi on summary judgment. (Dkt. 31.)

4 Plaintiff also included as defendants in his complaint unidentified KCCF custody officers,  
5 transport officers, supervisors, nurses, and other medical providers. However, as explained at the  
6 outset of this case, the Court permitted the use of “John Doe” defendants only until plaintiff had  
7 the opportunity through discovery to identify unknown individuals. (Dkt. 5 at 3.) Plaintiff had an  
8 obligation to provide names and addresses and, without that information, service could not be  
9 effectuated. Because plaintiff did not provide any names or addresses, there are no individual  
10 defendants in this case. (*See* Dkt. 31 at 1-2 (April 2017 order stating only Dr. Sagi and King  
11 County remained as defendants at that time).)

12 King County, the sole remaining defendant, now moves for summary judgment. (Dkt. 47.)  
13 Plaintiff opposes the motion, while also requesting an order compelling discovery responses, an  
14 extension of time to respond or a stay, and the appointment of counsel. (Dkts. 55-56.) The Court  
15 herein concludes plaintiff’s requests should be denied, King County’s motion should be granted,  
16 and plaintiff’s complaint and this action should be dismissed.

### 17 BACKGROUND

18 On November 8, 2015, plaintiff was involved in a head-on car collision, arrested at the  
19 scene, and transported to HMC. (Dkt. 48 at 2; Dkt. 54 at 7-8.) HMC provided treatment for  
20 dislocation and fracture of plaintiff’s right hip, multiple rib fractures, and pneumonia. (Dkt. 48 at  
21 2.) On November 17, 2015, HMC discharged plaintiff to KCCF with prescriptions and a request  
22 for a follow-up appointment with HMC Orthopedics (HMC Ortho). (*Id.*)

23 At intake, KCCF Jail Health Services (JHS) staff confirmed plaintiff’s prescriptions and

1 discharge instructions with HMC, including an indication to be non-weight bearing on the right  
2 leg. JHS entered prescriptions for, *inter alia*, MS Contin (extended release morphine), oxycodone,  
3 acetaminophen, and gabapentin for nerve pain, provided plaintiff with a walker, wheelchair, and  
4 incentive spirometer for his lungs, scheduled a follow-up appointment at HMC, and moved  
5 plaintiff into the infirmary. (*Id.* at 3-4.) KCCF transferred plaintiff to the general population on  
6 November 24, 2015, after medical clearance by a physician and a fitting with crutches. (*Id.* at 3,  
7 5.) From the time of his intake through his December 6, 2016 transfer from KCCF, JHS and HMC  
8 saw plaintiff and provided treatment on numerous occasions. (*See id.* at 3-11.)

9 Plaintiff takes issue with many different aspects of his treatment, or lack thereof, prior to  
10 and throughout his KCCF incarceration. (*See* Dkts. 4 and 4-1.) He maintains his HMC discharge  
11 occurred at the behest of KCCF, despite being told his injuries would take weeks to heal. He  
12 alleges he was required, in the KCCF infirmary, to get in and out of bed to receive his medication  
13 and use the restroom, despite his inability to walk or bear weight on his injured leg/hip. Plaintiff  
14 contends KCCF prematurely withdrew his wheelchair and cut-off pain and nerve damage  
15 medication, failed to provide proper transportation, with a wheelchair and “cabulance” (wheelchair  
16 van), to court and to HMC for follow-up appointments, denied proper shower access, and failed to  
17 provide physical therapy. He alleges King County acted or failed to act in an effort to satisfy its  
18 “pre-trial needs.” Plaintiff avers his injuries did not heal properly, causing him immense, ongoing  
19 pain and permanent physical damage.

## 20 DISCUSSION

21 In arguing its entitlement to summary judgment, King County denies deliberate  
22 indifference to plaintiff’s medical needs or any custom or policy depriving plaintiff of a clearly  
23 established constitutional right. Plaintiff both counters these contentions and requests other relief

1 prior to a ruling on summary judgment.

2 A. Plaintiff's Miscellaneous Requests for Relief

3 Plaintiff requests an order compelling discovery responses, either an extension of time to  
4 respond to King County's motion or a stay pending inspection of documents pertinent to his  
5 claims, and the appointment of counsel. (Dkt. 55 at 16, 48-49 and Dkt. 56 at 11-12, 15). He bases  
6 these requests, at least in part, on an alleged deprivation of access to his documents and King  
7 County's failure to comply with the civil rules of procedure in relation to discovery requests.

8 On July 7, 2017, the Court rejected plaintiff's motion for an order compelling discovery.  
9 (Dkt. 53.) Plaintiff had been notified, in early November 2016, of the January 3, 2017 discovery  
10 deadline, and that he must provide discovery requests at least thirty days prior to that deadline.  
11 (Dkt. 12 at 1.) Although the Court twice thereafter extended the deadline, plaintiff did not provide  
12 his discovery requests to defendants until the day prior to the final, May 31, 2017 discovery  
13 deadline. (See Dkt. 53 at 2-3.) He also simultaneously filed a motion to compel, with no indication  
14 of any good faith effort to resolve his discovery issues prior to filing the motion. (*Id.*) Plaintiff  
15 now states counsel for King County refused his attempt to confer. (Dkt. 55 at 2.) This bare  
16 suggestion, denied by King County (Dkt. 60 at 1-2) and unaccompanied by any evidentiary  
17 support, does not justify an order compelling responses to plaintiff's untimely discovery requests.

18 Nor does the Court find any basis for further discovery, an extension, or a stay based on an  
19 alleged inability to access documents or any other institutional barrier (*see, e.g.*, Dkt. 56 at 4-5  
20 (describing the destruction of his mail and other aspects of his current incarceration)). The initial  
21 period of discovery ran for a full month prior to plaintiff's transfer, in early December 2016, from  
22 KCCF to Washington Corrections Center (WCC). The Court extended the discovery deadline to  
23 April 5, 2017, with consideration of the fact plaintiff had been moved to WCC's receiving unit

1 and lacked access to his legal materials. (Dkt. 27.) WCC and CRCC employees now attest plaintiff  
2 had in his possession three legal envelopes and a chain bag upon his arrival at CRCC on January  
3 26, 2017, and received an additional box on February 23, 2017. (Dkts. 61-62.) However, when  
4 plaintiff sought a second extension of the discovery deadline, in early April 2017, he maintained  
5 he had not yet received the box containing his legal evidence. (Dkt. 28.) The Court extended the  
6 deadline to the end of May 2017 (Dkt. 32) and plaintiff did not request an additional extension.

7 Plaintiff, moreover, timely submitted two responses to King County's motion for summary  
8 judgment. (Dkts. 55-56). These submissions include detailed responsive arguments. Plaintiff also  
9 submitted a filing containing additional argument and attaching medical and other documents in  
10 response to King County's reply. (Dkts. 63-64.)<sup>1</sup> This "surreply" need not be considered given  
11 that it fails to comply with any aspect of Local Civil Rule 7(g) (a surreply must be "strictly limited"  
12 to addressing a request to strike material in a reply brief: "Extraneous argument or a surreply filed  
13 for any other reason will not be considered."; surreply must also be preceded by notice of intent to  
14 file, submitted within five days of the reply brief, and may not exceed three pages).) However, in  
15 light of plaintiff's pro se status and a desire to address his arguments in full, the undersigned herein  
16 considers the surreply and attachments.

17 Considered together with the significant amount of time provided to conduct discovery in  
18 this case, plaintiff's several different responsive filings refute the need for additional discovery, an  
19 extension, or a stay. It is further unclear how additional discovery or a delay in the resolution of  
20 King County's motion would cure the defects necessitating dismissal of this suit.

21 The Court, finally, finds no basis for the appointment of counsel. As the Court previously

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23 <sup>1</sup> The second filing is identical to the first, with the exception of the signature date and the inclusion  
of attachments. (See Dkts. 63-64.)

1 determined (*see* Dkt. 27 at 2-4), plaintiff does not present exceptional circumstances sufficient to  
2 warrant appointed counsel. *Wilborn v. Escalderon*, 789 F.2d 1328, 1331 (9th Cir. 1986). All of  
3 plaintiff's miscellaneous requests should, therefore, be denied.

4 B. King County's Motion for Summary Judgment

5 Summary judgment is appropriate when, viewing the evidence in the light most favorable  
6 to the nonmoving party, there exists "no genuine dispute as to any material fact" such that "the  
7 movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *Anderson v. Liberty*  
8 *Lobby, Inc.*, 477 U.S. 242, 248 (1986). Material facts are facts which might affect the outcome of  
9 the pending action under governing law. *See Anderson*, 477 U.S. at 248. Genuine disputes are  
10 those for which the evidence is such that "a reasonable jury could return a verdict for the  
11 nonmoving party." *Id.*

12 In response to a properly supported summary judgment motion, the nonmoving party may  
13 not rest upon mere allegations or denials in the pleadings, and must set forth specific facts  
14 demonstrating a genuine issue of fact for trial and produce evidence sufficient to establish the  
15 existence of the elements essential to his case. *See* Fed. R. Civ. P. 56(e). *See also Hernandez v.*  
16 *Spacelabs Med. Inc.*, 343 F.3d 1107, 1112 (9th Cir. 2003) (party opposing summary judgment may  
17 not rest upon mere allegations or denials in the pleadings, unsupported conjecture, or conclusory  
18 statements), and *Intel Corp. v. Hartford Accident & Indem. Co.*, 952 F.2d 1551, 1558 (9th Cir.  
19 1991) (nonmoving party must present significant and probative evidence to support his or her  
20 claims). A mere scintilla of evidence is insufficient to create a factual dispute. *See Anderson*, 477  
21 U.S. at 252. In ruling on a motion for summary judgment, the court may not weigh the evidence  
22 or make credibility determinations. *Id.* at 255.

23 Plaintiff raised his claims pursuant to 42 U.S.C. § 1983. In order to sustain a § 1983 claim,

1 plaintiff must show (1) he suffered a violation of rights protected by the Constitution or created by  
2 federal statute, and (2) the violation was proximately caused by a person acting under color of state  
3 or federal law. *West v. Atkins*, 487 U.S. 42, 48 (1988); *Crumpton v. Gates*, 947 F.2d 1418, 1420  
4 (9th Cir. 1991). Plaintiff alleges a constitutional violation through deliberate indifference to his  
5 serious medical needs and municipal liability for the violation of his rights.<sup>2</sup> The Court finds King  
6 County entitled to summary judgment.

7 1. Medical treatment:

8 The Court applies a deliberate indifference standard in considering claims relating to  
9 medical care. *Estelle v. Gamble*, 429 U.S. 97, 105 (1976); *Clouthier v. County of Contra Costa*,  
10 591 F.3d 1232, 1241 (9th Cir. 2010), *overruled in part on other grounds in Castro v. County of*  
11 *Los Angeles*, 833 F.3d 1060, 1070-71 (9th Cir. 2016), *cert. denied*, 137 S. Ct. 831, 97 L. Ed. 2d 69  
12 (2017).<sup>3</sup> A prisoner or pretrial detainee must allege “acts or omissions sufficiently harmful to  
13 evidence deliberate indifference to serious medical needs.” *Estelle*, 429 U.S. at 106.

14 A prison official may be deemed to have been deliberately indifferent to serious medical  
15 needs “when they deny, delay, or intentionally interfere with medical treatment.” *Hallett v.*  
16 *Morgan*, 296 F.3d 732, 744 (9th Cir. 2002) (sources and internal quotation marks omitted).  
17 Liability applies only where a prison official knows the inmate faces “a substantial risk of serious  
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19 <sup>2</sup> The Court declines to address information or argument on any other, unrelated matters. (*See, e.g.*,  
Dkt. 57 at 1 and Dkt. 63 at 1-2, 7.)

20 <sup>3</sup> In *Castro*, 833 F.3d at 1070-71, the Ninth Circuit held the Fourteenth Amendment’s “objective  
21 standard” addressing an excessive force claim and set forth in *Kingsley v. Hendrickson*, 135 S. Ct. 2466,  
192 L. Ed. 2d 416 (2015), applies to a pretrial detainee’s failure-to-protect claim. The Ninth Circuit has  
22 not indicated an alteration in the deliberate indifference standard as applied to pretrial detainees in medical  
treatment claims. *See, e.g., Conley v. Nielsen*, No. 15-35732, 2017 U.S. App. LEXIS 16214 at \*2-3 (9th  
23 Cir. Aug. 24, 2017); *Wilson v. Alvarez*, No. 16-17151, 2017 U.S. App. LEXIS 10042 at \*2-3 (9th Cir. June  
6, 2017). Here, under any potentially applicable standard, plaintiff’s medical treatment claim is properly  
dismissed.

1 harm and disregards that risk by failing to take reasonable measures to abate it.” *Farmer v.*  
2 *Brennan*, 511 U.S. 825, 847 (1994). A “defendant must purposefully ignore or fail to respond to  
3 a prisoner’s pain or possible medical need in order for deliberate indifference to be established.”  
4 *McGuckin v. Smith*, 974 F.2d 1050, 1060 (9th Cir. 1992), *overruled on other grounds by WMX*  
5 *Techs., Inc. v. Miller*, 104 F.3d 1133 (9th Cir. 1997). A defendant “must not only ‘be aware of  
6 facts from which the inference could be drawn that a substantial risk of serious harm exists,’ but  
7 that person ‘must also draw the inference.’” *Toguchi v. Chung*, 391 F.3d 1051, 1057 (9th Cir.  
8 2004) (quoting *Farmer*, 511 U.S. at 837). “A medical need is serious when the failure to treat it  
9 could result in significant injury or the unnecessary and wanton infliction of pain.” *Mendiola-*  
10 *Martinez v. Arpaio*, 836 F.3d 1239 (9th Cir. 2016) (citing *Jett v. Penner*, 439 F.3d 1091, 1096 (9th  
11 Cir. 2006)).

12 The indifference to medical needs must be substantial; a constitutional violation is not  
13 established by negligence or “an inadvertent failure to provide adequate medical care[.]” *Estelle*,  
14 429 U.S. at 105-06; *Anthony v. Dowdle*, 853 F.2d 741, 743 (9th Cir. 1988). Nor does a difference  
15 of opinion between an inmate and medical authorities regarding proper treatment give rise to a §  
16 1983 claim. *Franklin v. Oregon, State Welfare Div.*, 662 F.2d 1337, 1344 (9th Cir. 1981). *See*  
17 *also Estelle*, 529 U.S. at 106 (“Medical malpractice does not become a constitutional violation  
18 merely because the victim is a prisoner.”)

19 King County observes plaintiff’s failure to identify any individual defendant, and asserts  
20 its staff provided plaintiff with medically appropriate care, including repeated referrals to  
21 orthopedic specialists at HMC. (See Dkts. 47-48.) King County further states that HMC Ortho  
22 cleared plaintiff to be touch down weight bearing as early as November 30, 2015 and full weight  
23 bearing on February 8, 2016, and that JHS followed HMC Ortho recommendations by providing



1 a wheelchair, walker, crutches, and cane as recommended over the course of plaintiff's  
2 incarceration. King County contends plaintiff himself disregarded HMC recommendations and  
3 admitted to being full weight bearing before medical clearance to do so. King County maintains  
4 that, once cleared for greater mobility by HMC Ortho, there was no medical reason for transport  
5 by wheelchair and cabulance. King County also contends JHS staff made medically appropriate  
6 decisions with regard to the types, doses, schedules, and continued necessity of plaintiff's  
7 medications. Plaintiff rejects King County's contentions and, in particular, stresses the absence of  
8 any evidence he was provided with prescribed physical therapy. (*See, e.g.*, Dkts. 55 and 63.)

9 This claim should be dismissed due to plaintiff's failure to name any individual allegedly  
10 deliberately indifferent to his serious medical needs. Moreover, even if he had named an individual  
11 defendant, plaintiff's claim would be subject to dismissal on summary judgment. A declaration  
12 from the JHS Medical Director outlines treatment provided to plaintiff at both KCCF and HMC,  
13 and attests to the medical appropriateness of that care. (Dkt. 48.) Medical records submitted by  
14 plaintiff corroborate the content of that declaration and King County's arguments on summary  
15 judgment, and directly refute plaintiff's assertion as to the absence of any physical therapy. (*See,*  
16 *e.g.*, Dkt. 64 at 13 (October 16, 2016: "Uses two crutches, however walks with both feet weight  
17 bearing."); *id.* at 45 (November 15, 2016: referral to HMC Physical Therapy (PT) for "work on  
18 gait training and strengthening exercises"); *id.* at 21 (November 29, 2016: "Will try an increased  
19 dose of gabapentin at bed time to aid in pain control. Will otherwise wait for further guidance  
20 from HMC PT and HMC Ortho. [Patient] is agreeable to this plan and felt reassured."); *id.* at 27  
21 (December 2, 2016: "[Inmate] returns from HMC PT Appt. See HMC Notes. F/U in 4 week.  
22 Sent Exercise sheet – copy made for [inmate].") (case of text modified); *id.* at 29 (December 3,  
23 2016: "Reviewed PT record of instructions for rehab of R hip . . . . They recommend monthly

f/u sessions.”); *id.* at 51 (December 4, 2016: HMC PT appointment scheduled for January 3, 2017); and *id.* at 43, 49 (reflecting cancellation of one or more external PT and occupational therapy appointments scheduled to occur *after* plaintiff’s transfer from KCCF on December 6, 2016).)

To the extent plaintiff believes he should have received a higher level of medical care or that care providers should have followed alternative courses of treatment, neither contention would preclude summary judgment. As argued by King County, the evidence does not show constitutionally deficient care or the required subjective element of deliberate indifference by any hypothetical individual defendant.

2. Municipal liability:

A municipality or local government unit, such as King County, can be sued as a “person” under § 1983. *Monell v. Department of Social Servs. of City of New York*, 436 U.S. 658, 691-94 (1978). However, a municipality cannot be held liable under § 1983 solely because it employs a tortfeasor. *Id.* A plaintiff seeking to impose municipal liability must identify municipal “policy” or “custom” that caused his or her injury. *Bd. of the Cnty. Comm’rs of Bryant Cnty. v. Brown*, 520 U.S. 397, 403 (1997) (citing *Monell*, 436 U.S. at 694). *See also City of Canton v. Harris*, 489 U.S. 378, 385 (1989) (plaintiff must show “a direct causal link between a municipal policy or custom and the alleged constitutional deprivation”). Liability may also exist where there is a “policy of inaction and such inaction amounts to a failure to protect constitutional rights.” *Oviatt v. Pearce*, 954 F.2d 1470 (9th Cir. 1992) (citing *City of Canton*, 489 U.S. at 388). Municipal liability must reflect “deliberate indifference” to a constitutional right, *City of Canton*, 489 U.S. at 392, and entails an objective inquiry, *Castro*, 833 F.3d at 1076 (citing Supreme Court’s understanding that an objective standard necessarily applies to municipalities “for the practical reason that government entities, unlike individuals, do not themselves have states of mind.”)

1 To impose municipal liability in this case, plaintiff must show (1) a King County employee  
2 violated his constitutional rights; (2) King County has customs or policies that amount to deliberate  
3 indifference; and (3) those customs or policies were the moving force behind the employee's  
4 violation of plaintiff's constitutional rights. *Long v. County of Los Angeles*, 442 F.3d 1178, 1186  
5 (9th Cir. 2006). As discussed above, plaintiff does not identify a King County employee who  
6 violated his constitutional rights. Plaintiff also fails to identify or provide evidence supporting the  
7 existence of a custom or policy amounting to deliberate indifference and serving as the moving  
8 force behind any such constitutional violation.

9 The Court allowed service on King County because plaintiff appeared to allege a  
10 constitutional violation through one or more municipal policies or practices, such as acts or  
11 omissions occurring as a result of "pre-trial needs." (Dkt. 5 at 3.) In responding to King County's  
12 motion for summary judgment, plaintiff did not repeat or support that assertion, and did not  
13 identify any other policy or practice as a basis for municipal liability. (*See* Dkts. 55-56.)

14 In the "surreply" submitted after the completion of briefing, plaintiff asserts various other  
15 policies or customs caused his injuries. Although not entirely clear, plaintiff appears to identify  
16 policies or customs of (1) overlooking the First Amendment right to grieve medical treatment; (2)  
17 treating an inmate as a nuisance, rather than as a patient; (3) failing to follow prescribed physical  
18 therapy; and (4) providing deficient care. (Dkt. 63 at 8-11.) This appears to reflect a mere re-  
19 packaging of alleged acts or omissions of unidentified individual King County employees as  
20 general policies or customs of King County, rather than the identification of any actual policies or  
21 customs. *See Trevino v. Gates*, 99 F.3d 911, 918 (9th Cir. 1996) ("Liability for improper custom  
22 may not be predicated on isolated or sporadic incidents; it must be founded upon practices of  
23 sufficient duration, frequency and consistency that the conduct has become a traditional method

1 of carrying out policy.”). In any event, plaintiff’s belated contention such policies or customs  
2 existed and resulted in the violation of his constitutional rights is no more than conclusory and  
3 contradicted by the evidence before the Court (*see* Dkt. 48 and Dkt. 64 at 13-69). King County is,  
4 therefore, entitled to summary judgment.

#### 5 CONCLUSION

6 The Court recommends plaintiff’s requests for an order compelling discovery, an extension  
7 of time or a stay, and for the appointment of counsel (*see* Dkts. 55-56) be DENIED, that King  
8 County’s Motion for Summary Judgment (Dkt. 47) be GRANTED, and that this case be  
9 DISMISSED with prejudice. A proposed order accompanies this Report and Recommendation.

#### 10 OBJECTIONS

11 Objections to this Report and Recommendation, if any, should be filed with the Clerk and  
12 served upon all parties to this suit within **twenty-one (21) days** of the date on which this Report  
13 and Recommendation is signed. Failure to file objections within the specified time may affect  
14 your right to appeal. Objections should be noted for consideration on the District Judge’s motions  
15 calendar for the third Friday after they are filed. Responses to objections may be filed within  
16 **fourteen (14) days** after service of objections. If no timely objections are filed, the matter will be  
17 ready for consideration by the District Judge on **September 29, 2017**.

18 Dated this 5th day of September, 2017.

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21 Mary Alice Theiler  
22 United States Magistrate Judge  
23